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No. 90-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SEAFORD, DELAWARE,

Petitioner,

v.

DELMARVA POWER & LIGHT COMPANY,

Respondent.

Petitioner's Reply Memorandum
In Support of
Petition for a Writ of Certiorari to the
Supreme Court of the State of Delaware

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No matter how one comes at it, the decision below constitutes a holding by the Delaware Supreme Court that a private electric utility, possessing a nonexclusive franchise to serve certain customers, is entitled to compensation under the fifth and fourteenth amendments of the Constitution of the United States for the taking of the patronage of such customers, when a municipal electric utility properly assumes the provision of service to them. This holding squarely conflicts with a number of decisions of this Court and of the United States courts of appeals.

Citing, among other authorities, *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 577 (1904), the principle was encapsulated by the United States Court of Appeals for the Fourth Circuit as follows:

> Further, it has long been settled that the holder of a non-exclusive franchise has no monopoly, and cannot complain of competition from a publicly-created utility system. Phrased another way, the creation by a State of a competing public utility does not amount to a "taking" compensable under the fourteenth amendment.

Durham v. North Carolina, 395 F.2d 58, 60 (1968). In accord, *see* cases cited Pet. 6 n.3.

While it is true that a state is free to define property about as it chooses, it may not, by defining as property an interest of a kind this Court has determined not to be protected by the fifth amendment against uncompensated taking, compel a subdivision of the state, *as a matter of federal constitutional law*, to compensate the former owner upon a taking of such an interest. In other words, a state court may not mandate the payment of compensation under the fifth and fourteenth amendments for the taking of an interest of a kind this Court has determined is not protected under the federal Constitution. The corollary is that, by withholding the appellation of property from interests of sorts this Court recognizes as entitled to protection under the fifth and fourteenth amendments, a state may not commission the taking of such interests without compensation. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980).

Delmarva's argument that the judgment below is not final within the intendment of 28 U.S.C. § 1257 (1982) is based on the proposition that, where the amount of compensation remains to be determined,

judgments in eminent domain proceedings are usually not final. Respond's Br. 3-4. While Delmarva accurately recites the general rule, it wholly ignores the reasons for the rule. These are, of course, that in many situations the determination of compensation can take on constitutional dimensions and that valuation proceedings can raise additional constitutional questions. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 n.6 (1975).

It is worthy of note that Delmarva does not traverse Seaford's statements that here there is no possibility that the valuation proceedings remaining to be held will raise any federal issues, constitutional or other, and that, regardless of the outcome of the valuation proceedings, the issue of the compensability of Delmarva's nonexclusive franchise under the federal Constitution cannot again be brought before the Delaware Supreme Court. Thus, in this case, the reasons for the general rule - that a judgment in a condemnation case is not ordinarily final if the amount of compensation remains to be determined - are all inapplicable. The judgment below is final within the intendment of 28 U.S.C. § 1257, and the error of constitutional law made by the court below cannot be corrected if it is not corrected now.

If Delmarva had pleaded simply that, under the law of Delaware, it is entitled to compensation for Seaford's interference with its nonexclusive franchise, and if the court below had confined itself simply to ruling that under state law Delmarva is so entitled, we would not be here. But Delmarva specifically pleaded its entitlement to compensation for interference with its nonexclusive franchise under the fifth and fourteenth amendments of the Constitution of the United States,

Pet. App. 42a, 45a, and, on that basis, the court below held in favor of Delmarva's entitlement. *Id.* 27a. To do so, the Delaware court found it necessary to deny continuing vitality to one of the several decisions of this Court that establish that the federal Constitution does not require compensation for the taking of a nonexclusive franchise. *Id.* 17a.

There is no question that, at least, the state court decision is "interwoven with federal law, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (revising the standards for determining the adequacy and independence of state grounds).

Conclusion

The holding of the court below, that the federal Constitution requires the payment of compensation for interference by competition with a utility's nonexclusive franchise to serve certain customers, conflicts with a number of decisions of this and other federal courts. This holding constitutes a final judgement within the meaning of 28 U.S.C. § 1257 that can be expected to cause trouble and confusion until corrected by this Court. A writ of certiorari should be granted.

Respectfully submitted,

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